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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-693.

COMMONWEALTH OF PENNSYLVANIA and BUCKS COUNTY INTERFAITH HOUSING CORPORATION, a Non-Profit Corporation, SUSAN CUMMINGS, RAMONA MORALES SERRANO, JEANNE COTTON, PEDRO ORTIZ, OLIVIA MOFFIT, Individually and on Behalf of Others Similarly Situated,

Petitioners,

v.

COUNTY OF BUCKS and BUCKS COUNTY PLANNING COMMISSION and BUCKS COUNTY HOUSING AUTHORITY and All of the Municipalities of Bucks County (Individually Named in Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania),

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania.

REPLY BRIEF TO RESPONDENT'S BRIEF.

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ARGUMENT.

In the three briefs filed by Respondents, Respondents contend that the Petition for Writ of Certiorari should be denied for the following reasons:

(a) Petitioners failed to follow statutory remedies and procedures available under the Pennsylvania Municipalities Planning Code;

(b) Petitioners' action was premature and sought an advisory adjudication on hypothetical facts; and

(c) The Court could not grant the relief requested by the Petitioners.

Even if the Supreme Court concludes that the Pennsylvania courts were concerned about the issues mentioned by the Respondents, consideration of these issues involves federal questions rather than state law, with the exception of the question of the granting of the relief requested. Consideration of the issue of relief is premature at this stage of the case. No answer has been filed to the Complaint; the issues are not drawn; and there is no factual record.

In regard to the purported availability of statutory remedies and procedures, the difficulty which the Petitioners face is that the Pennsylvania Municipalities Planning Code, 53 P. S. §10101, et seq., does not include persons in the status of the Petitioners as the kinds of persons who may be granted relief. The Pennsylvania Municipalities Planning Code is based upon the Standard State Zoning Enabling Act. See Krasnowiecki, "Zoning Litigation and the New Pennsylvania Procedures," 120 *Univ. of Pa. L. Rev.* 1029 (1972). See also *Id.* at 1103, n. 299. This Act grants standing to landowners, equitable owners, adjoining landowners, and residents. The Act does not recognize standing in future residents.

It may be argued that the zoning ordinances do not restrain the activities of future residents since the zoning restrictions apply only to landowners. This is true. The future residents are in a situation comparable to that of the person who desires an abortion. See *Roe v. Wade*, — U. S. — (1973). The abortion statutes do not make her act a criminal act. The statute restricts the activities of others, to wit, the doctor who commits a criminal act by performing the abortion. However, if doctors are prohibited from performing abortions, the person who desires them cannot obtain them. There is no way, except by an action in equity, for the person who wants an abortion to make out a ripe case by getting herself arrested for participating in an abortion since her act is not a criminal act. Her case is ripe when she is pregnant and wants an abortion.

Similarly, the zoning ordinances apply to landowners and not to future residents. However, to the extent to which these zoning restrictions preclude the construction of housing, they have the effect of preventing persons from becoming residents of the municipality and thereby exclude them. So that it is their rights which are at stake. The Pennsylvania courts, though, require that the challenge to the validity of the zoning ordinances be brought by someone who has applied for development. Since the future residents are not developers, they cannot pursue the remedy available to developers and must assert their rights in an action in equity. Their action is ripe if they desire to reside in an area in which there is no housing as a result of exclusionary zoning.

There are non-profit corporations which desire to develop subsidized housing in Bucks County which have joined the future residents and the Commonwealth of Pennsylvania as Petitioners. Their Complaint also does not

refer to particular sites but to the general and complete unavailability of sites which are not subject to zoning restrictions which prevent the construction of subsidized housing. There is no reason why they should not be permitted to challenge the overall system of zoning restrictions which results in unavailability of sites upon which subsidized housing can be constructed rather than litigating in a piecemeal nature each and every site upon which they want to build.

Respondents also contend that Petitioners request a decision in abstract which amounts to an advisory opinion. But this is the same issue presented in another way. Respondents, and the Pennsylvania courts, insist that a challenge to the validity of exclusionary zoning may be presented only by someone who wants to contest the prohibition of construction upon a particular site. This is fine for a developer who has such a site, but it does not allow the person who has been excluded to contest the validity of his exclusion. In other words, it denies him standing. There is no assurance that there will be actual construction after the zoning restriction is invalidated. Similarly, there is no assurance that there will be doctors willing to perform abortions after the abortion statute is invalidated at the request of the person who desires the abortion. (To avoid this, in *Roe v. Wade*, a doctor was added as a plaintiff. In the instant case, non-profit corporations which desire to build subsidized housing joined as plaintiffs.)

There is, of course, no factual record. But, Petitioners have had no opportunity to make such a record since preliminary objections in the nature of a demurrer were sustained. Once there is such a record, the case will certainly be more concrete than it is at its present juncture. Just as the question of appropriate relief may only be determined after a record is made, so the question of

whether Petitioners can prove their cause of action must also be deferred until that stage of the case, assuming that Petitioners have standing to present a case. Whether Petitioners have such standing is the federal question at issue in the instant matter.

Respectfully submitted,

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